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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America,
10 Plaintiff/Respondent,
11 v.
12 Carlos Alvarez-Espinoza,
13 Defendant/Movant.

No. CV-12-01083-PHX-DGC (SPL)
CR-08-0611 PHX DGC

ORDER

14 Carlos Alvarez-Espinoza, who is now confined in the United States Penitentiary in
15 White Deer, Pennsylvania, filed a Motion to Vacate, Set Aside, or Correct Sentence
16 pursuant to 28 U.S.C. § 2255. CVDoc. 1; CRDoc. 388.¹ United States Magistrate Judge
17 Steven P. Logan issued a Report and Recommendation (“R&R”) recommending that the
18 motion be denied. CVDoc. 10. Movant filed a written objection to the R&R. CVDoc.
19 16. No party has requested oral argument. For the reasons that follow, the Court will
20 accept the R&R and deny the motion.

21 **I. Background.**

22 Movant does not object to the R&R’s recitation of facts, and therefore the Court
23 will adopt it summarily. A federal grand jury returned a superseding indictment against
24 Movant, charging him with fifteen felony counts on January 7, 2009.
25 CVDoc. 10 at 1. The government moved to dismiss two counts at the commencement of

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27 ¹ As in the R&R, documents filed in CV-12-0183-PHX-DGC will be referred to
28 as “CVDoc” and documents filed in the related criminal action, CR-08-00611-PHX-
DGC, will be referred to as “CRDoc.”

1 the jury trial on June 15, 2009, in Arizona District Court. *Id.* The jury found Movant
2 guilty of all the remaining charges. *Id.* at 2. The charges related to the harboring of 21
3 smuggled aliens at a residence in Phoenix, Arizona, including the use and possession of a
4 firearm in relation to a crime of violence. *Id.* at 1-2. The District Court imposed
5 sentences totaling in combination of 1644 months (137 years) of imprisonment. *Id.*
6 After sentencing, Movant filed a timely Notice of Appeal raising four issues, including
7 that the court erred in not dismissing the indictment after the government failed to retain
8 Osmund Sanchez as a witness when Sanchez had provided the basis for the search
9 warrant. *Id.* at 2-3. As to that issue, the Ninth Circuit found that Defendant could not
10 show that the government acted in bad faith and caused prejudice to his case because “as
11 conceded at oral argument, he cannot make any such showing.” CRDoc. 354-1 at 2. The
12 Ninth Circuit affirmed Movant’s convictions and sentences (*id.* at 3), and entered its
13 formal mandate on December 28, 2010 (CRDoc. 354). Movant then filed the instant
14 motion, which raises eight grounds for relief. CVDocs. 1 & 2; CRDocs. 388 & 389.

15 The R&R concludes that Movant’s grounds for relief are procedurally defaulted,
16 precluded, or fail on the merits. CVDoc. 10 at 16.

17 **II. Discussion.**

18 The Court may accept, reject, or modify, in whole or in part, the findings or
19 recommendations made by a magistrate judge. *See* 28 U.S.C. § 636(b)(1). The Court
20 must undertake a de novo review of those portions of the R&R to which specific
21 objections are made. *See id.*; Fed. R. Civ. P. 72(b)(3); *United States v. Reyna-Tapia*, 328
22 F.3d 1114, 1121 (9th Cir. 2003). Movant’s only objection is to the R&R’s determination
23 with respect to Ground Two (Doc. 16 at 5), and the Court has reviewed that specific
24 objection *de novo*.²

25 ² The R&R recommends that to the extent Ground Two “claims that,
26 notwithstanding Osmund Sanchez, other unnamed material witnesses were released
27 without defense interviews” (CVDoc. 10 at 13 n. 8), that the claim is procedurally
28 defaulted because it was not raised on direct appeal and “Movant has not shown that
prejudice resulted from appellate counsel’s failure to raise the claim” (*id.*). Movant

1 **A. Ground Two.**

2 Ground Two claims that Movant's Fifth and Sixth Amendment rights were
3 violated because material witnesses were deported or released prior to Movant having
4 opportunity to interview or depose them. CVDoc. 1 at 5; CVDoc. 2 at 17-22; CRDoc.
5 388 at 5; CRDoc. 389 at 17-22. "To show that the government's deportation of a an
6 alien-witness violated his Fifth Amendment right to due process and his Sixth
7 Amendment right to compulsory process, [the defendant] must show that the government
8 acted in bad faith and that this conduct resulted in prejudice to his case." *United States v.*
9 *Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002) (citing *United States v. Ding*,
10 930 F.2d 687, 693 (9th Cir. 1991)). The R&R finds that because Movant raised this issue
11 on direct appeal, the Ninth Circuit's rejection of the argument precludes Movant from
12 raising the same issue in his § 2255 motion. CVDoc. 10 at 13-14 (citing *United States v.*
13 *Currie*, 589 F.2d 993, 995 (9th Cir. 1979) ("Issues disposed of on a previous direct
14 appeal are not reviewable in a subsequent § 2255 proceeding.")). Movant objects to the
15 R&R's preclusion determination and argues that *United States v. Leal-Del Carmen*, 697
16 F.3d 964 (9th Cir. 2012), constitutes a subsequent change in the law that requires a
17 different outcome. CVDoc. 16 at 5-7.

18 The R&R finds that "*Leal-Del Carmen* was confronted with the same issues,
19 applied preexisting precedent, and arrived at the same conclusion as in *United States v.*
20 *Ramirez-Lopez*, 315 F.3d 1143 (9th Cir. 2003)." CVDoc. 10 at 14. Movant argues that
21 this finding was error because *Ramirez-Lopez* was withdrawn and the appeal dismissed.
22 CVDoc. 16 at 6 (citing *United States v. Ramirez-Lopez*, 315 F.3d 1143 (9th Cir. 2003),
23 *withdrawn by United States v. Ramirez-Lopez*, 327 F.3d 829 (9th Cir. 2003)). The Court
24 agrees that the R&R erred when it cited *Ramirez-Lopez*, but this does not render the

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26 does not appear to object to this portion of the R&R's recommendation, and instead
27 limits his objection to the R&R's recommendation that Ground Two be denied with
28 respect to the deportation of Osmund Sanchez. CVDoc. 16 at 5. The Court has
limited its *de novo* review accordingly.

1 R&R's conclusion wrong. The Ninth Circuit cited *Gastelum-Almeida*, 298 F.3d at 1174,
2 in its memorandum opinion in this case, rejecting Movant's argument that the
3 government's failure to retain a witness constituted a constitutional violation. CRDoc.
4 354-1 at 2. *Leal-Del Carmen* and *Gastelum-Almeida* apply the same precedent.
5 Compare *Leal-Del Carmen*, 697 F.3d at 969-70 (citing *Dring*, 930 F.2d at 693-94, and
6 *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864-65 & 872-73 (1982), with
7 *Gastelum-Almeida*, 298 F.3d at 1174 (citing *Dring*, 930 F.2d at 693-94, and *Valenzuela-*
8 *Bernal*, 458 U.S. at 872-73)). Movant argues that *Leal-Del Carmen* establishes a
9 presumption that a removed witness's testimony is favorable to the defendant (CVDoc.
10 16 at 15), but the case did not establish any such presumption. *Leal-Del Carmen* applies
11 the longstanding bad faith requirement, and holds that the government acts in bad faith
12 when it deports an alien witness the government *knows* to possess potentially exculpatory
13 evidence. 697 F.3d at 970 ("Once the government is aware that an alien has potentially
14 exculpatory evidence, it must treat that person as a material witness and give defense
15 counsel the opportunity to interview him and make a reasoned determination whether to
16 seek his retention pending trial. . . . The government remains free to deport witnesses it
17 has no reason to believe possess exculpatory evidence."). The deportation of the alien
18 witness in *Leal-Del Carmen* was a constitutional violation because "the government
19 *publicly admitted* that it actually knew of the deported witness' potentially exculpatory
20 testimony." CVDoc. 16 at 14 (emphasis in original). *Leal-Del Carmen* does not change
21 in Ninth Circuit law. See *Gastelum-Almeida*, 298 F.3d at 1174 (applying bad faith test
22 and stating that bad faith occurs when government deports a witnesses to gain an unfair
23 tactical advantage at trial).³

24 Movant also argues that his "appellate counsel was ineffective to the extent he
25 actually 'conceded' lack of bad faith or prejudice." CVDoc. 16 at 5-7. But Movant's

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27 ³ The only "presumption" discussed in *Leal-Del Carmen* concerns a missing
28 witness instruction. 697 F.3d at 974. Such an instruction is not at issue in this motion.

1 § 2255 motion raises ineffective assistance of counsel only with respect to trial
2 counsel, not appellate counsel (*see* CVDoc. 1 at 5-6, CVDoc. 1-1), and Movant cannot
3 raise in this Court arguments that were not included in his original § 2255 motion. *See*
4 *Greenhow v. Sec. of Health & Human Servs.*, 863 F.2d 633, 638-39 (9th Cir. 1988)
5 (“Allowing parties to litigate their case fully before the magistrate and, if unsuccessful
6 to change their strategy and present a different theory to the district court would
7 frustrate the purpose of the Magistrates Act.”), *overruled on other grounds by United*
8 *States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992); *see also Marshall v. Chater*, 75 F.3d
9 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the
10 magistrate judge’s recommendation are deemed waived.”).

11 The Court agrees with the R&R that Movant is precluded from re-litigating ground
12 two because the Ninth Circuit ruled on the same argument in Movant’s direct appeal.
13 CVDoc. 10 at 13-14. *See Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972)
14 (“The law in this circuit is clear that when a matter has been decided adversely on appeal
15 from a conviction, it cannot be litigated again on a 2255 motion.”).

16 **IT IS ORDERED:**

- 17 1. Magistrate Judge Steven P. Logan’s R&R (Doc. 10) is **accepted**.
- 18 2. The Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28
19 U.S.C. § 2255 (Doc. 1) is **denied**.
- 20 3. The Clerk of Court shall **terminate** this action.

21 Dated this 24th day of May, 2013.

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26 David G. Campbell
27 United States District Judge
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